

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
SEATTLE DIVISION

CHAD GOODMAN and JON J. OLSON,  
individually and on behalf of all others  
similarly situated,

Plaintiff,

v.

HTC AMERICA, INC. and  
ACCUWEATHER.COM, INC.,

Defendants.

Case No. 2:11-cv-01793-MJP

**JOINT STATUS REPORT AND DISCOVERY  
PLAN PURSUANT TO FED. R. CIV. P. 26(f)  
AND LOCAL RULE CR 16**

Complaint filed: October 26, 2011

Trial Date: Not Set

1 Plaintiffs Chad Goodman and Jon J. Olson (“Plaintiffs”) and Defendants HTC America,  
2 Inc. (“HTC”) and AccuWeather.com, Inc. (“AccuWeather”) (collectively, “Defendants”) jointly  
3 submit the following report pursuant to Federal Rule of Civil Procedure 26(f), Local Rule CR 16,  
4 and the Court’s Order Regarding Initial Disclosures, Joint Status Report, and Early Settlement  
5 (Dkt. No. 5), as modified by the Minute Order of December 23, 2011 (Dkt. No. 13).

6 **1. Nature and Complexity of the Case**

7 Plaintiffs Chad Goodman and Jon J. Olson (“Plaintiffs”) bring this action on behalf of  
8 themselves and three putative classes against Defendants HTC America, Inc. (“HTC”) and  
9 AccuWeather.com, Inc. (“AccuWeather”). Plaintiffs allege that HTC’s EVO 3D and EVO 4G  
10 smartphones contain an integrated AccuWeather software application that, when accessed by the  
11 user, provides weather information specific to the user’s location. Plaintiffs allege that the EVO  
12 3D and EVO 4G smartphones contained undisclosed defects, namely that integrated software  
13 causes the smartphones to transmit “fine” geolocation data to AccuWeather using the  
14 smartphones’ GPS capabilities, rather than the “coarse” geolocation data obtained by information  
15 from cell towers. Plaintiffs further allege that the GPS data is “unnecessarily precise” for the  
16 purpose of displaying weather information. Further, Plaintiffs allege that the fine location data is  
17 transmitted to AccuWeather in an unencrypted and insecure manner. Plaintiffs allege that they  
18 were injured by Defendants’ failure to disclose these defects because (1) they paid more for the  
19 EVO 3D and EVO 4G smartphones than they would have paid—and/or they would not have  
20 bought these particular smartphones at all—and paid more than the smartphones would have  
21 been valued by the market if Defendants had labeled the products accurately and adequately  
22 disclosed these defects; and (2) the defect caused their personal information to be exposed to  
23 third parties.

24 Plaintiffs assert these claims under several state consumer protection laws, all of which  
25 prohibit deceptive, misleading, fraudulent, or unfair business practices. Plaintiff Goodman, a  
26 resident of California, seeks relief on behalf of himself and a purported California Subclass for

1 alleged violations of California's Consumer Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*)  
 2 and Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*). Plaintiff Olson, a  
 3 resident of Minnesota, seeks relief on behalf of himself and a purported Minnesota Subclass for  
 4 alleged violations of Minnesota's Prevention of Consumer Fraud Act (Minn. Stat. §§ 325F.68–  
 5 .70), Unlawful Trade Practices Act (Minn. Stat. §§ 325D.09–.16), Deceptive Trade Practices Act  
 6 (Minn. Stat. §§ 325D.43–.48), and False Statement in Advertisement law (Minn. Stat.  
 7 § 325F.67). Both Plaintiffs seek relief for unjust enrichment on behalf of themselves and a  
 8 purported nationwide class.

9 Defendants filed separate motions to dismiss the class action complaint on January 20,  
 10 2012. (*See* Dkt. Nos. 20, 21.) Both motions were based on a lack of Article III standing (and,  
 11 therefore, subject matter jurisdiction under Rule 12(b)(1)) and failure to state a claim for relief  
 12 under Rule 12(b)(6).

13 Defendant HTC also moved to strike Plaintiffs' class allegations pursuant to Rules 12(f)  
 14 & 23(d)(1)(D), and included among the reasons to dismiss under Rule 12(b)(6) Plaintiffs' failure  
 15 to plead with the particularity required for claims sounding in fraud, pursuant to Rule 9(b).

16 Plaintiffs' response(s) to the motions are due by February 24, 2012, and Defendants'  
 17 respective replies are due on the motions' noting date of March 23, 2012.

18 Meanwhile, Defendant AccuWeather.com, Inc. informed Plaintiffs that it is not the  
 19 appropriate AccuWeather entity responsible for Plaintiffs' allegations. *See infra* at ¶ 5.A.

#### 20 **A. Proposed Extension of Time to Respond to the Amended Complaint**

21 Plaintiffs informed Defendants on February 9, 2012, that they anticipate filing an  
 22 amended complaint on February 10, 2012. Assuming that Plaintiffs' amended complaint  
 23 contains substantive changes requiring new responses, the parties agree on the following  
 24 schedule for responsive pleadings and subsequent briefing; the parties respectfully request that  
 25 the Court enter an order setting these deadlines: Defendants' answer, motion, or other  
 26 responsive pleading to the amended complaint, assuming such complaint is filed February 10,

2012, will be due on or before March 12, 2012 (31 days after the complaint is filed); Plaintiffs' response(s) will be due April 13, 2012; and any reply will be due April 27, 2012.

## **2. Alternative Dispute Resolution Methods**

The parties discussed the possibility of ADR during the Rule 26(f) conference. All parties agree that, at the appropriate time, private mediation would be the most appropriate ADR method.

## **3. Alternative Dispute Resolution Timing**

At this time, the parties believe that private mediation would be best undertaken after the Court's ruling on Defendants' respective motions to dismiss and any amendments to the Complaint have been made, as well as potentially a ruling at the class-certification stage.

## **4. Proposed Deadline for Joining Additional Parties**

Plaintiffs propose that the deadline for joining additional named plaintiffs be set for ninety (90) days after a decision on class certification (excluding any motion to strike the class allegations filed by Defendants). Plaintiffs further propose that the deadline for joining additional defendants be set for six months after all motions to dismiss filed by a Defendant in this case are ruled upon.

Defendants propose that the deadline for joining any additional parties be set for 30 days after an order denying Defendants' respective motions to dismiss.

## **5. Proposed Discovery Plan**

### **A. Rule 26(f) Conference and Rule 26(a) Initial Disclosures**

The Rule 26(f) conference took place on January 26, 2012 at 1:30 p.m. via telephone with counsel for all parties in attendance: Cliff Cantor, David A. Stampley, and Grace E. Parasmio participated on behalf of Plaintiffs; Matthew D. Brown and Christopher B. Durbin participated on behalf of Defendant HTC; and Thomas Merrick participated on behalf of Defendant AccuWeather.

Pursuant to the Court's Order Regarding Initial Disclosures, as modified by the parties' stipulation (Dkt. No. 12) and the Court's resulting Minute Order of December 23, 2011 (Dkt. No. 13), Named Plaintiffs and Defendant HTC served their respective Rule 26(a) initial disclosures on February 2, 2012.

Defendant AccuWeather notified the parties on January 31, 2012, that the entity identified in the complaint as AccuWeather.com, Inc. is not a proper party in this action. Because it is not a proper party, AccuWeather objects to its providing initial disclosures and takes the position that its initial disclosures should be delayed pending substitution of the proper AccuWeather entity as a defendant.

#### **B. Subjects and Phases of Discovery**

The parties discussed the scheduling and phases of discovery during the Rule 26(f) conference. However, these discussions occurred before Plaintiffs informed Defendants on February 9, 2012 that they intended to file an amended complaint on February 10, 2012, which may alter the specific dates identified below. The parties agree to the following schedule, based on the assumption that discovery will proceed without unnecessary motions or other delays, and subject to change upon the filing of Plaintiffs' amended complaint:

EVENT	DEADLINE	EST. DATE
Start of Class Certification Fact Discovery (Defendants' proposal)	If the court denies Defendants' motions to dismiss, fourteen (14) days after such order	Apr. 20, 2012 <sup>1</sup>
Completion of Class Certification Fact Discovery	Six (6) months after start of class certification fact discovery	Oct. 19, 2012

<sup>1</sup> Defendants note that this date is subject to change, assuming that Plaintiffs' Amended Complaint alters the briefing schedule, as discussed *supra*.

EVENT	DEADLINE	EST. DATE
Plaintiffs' Class Certification Expert Witness Disclosures/Reports (FRCP 26(a)(2))	Two (2) weeks after close of class certification fact discovery	Nov. 2, 2012
Defendants' Class Certification Expert Witness Disclosures/Reports (FRCP 26(a)(2))	Four (4) weeks after Plaintiffs' class certification expert reports	Dec. 4, 2012
Plaintiffs' rebuttal class certification expert witness reports, if needed	Three (3) weeks after Defendants' Class Certification Expert Witness Disclosures/Reports, unless this includes the holiday season, in which case, five (5) weeks	Jan., 8, 2013 (accounts for holiday season)
Completion of Class Certification Expert Discovery	Two (2) weeks after rebuttal class certification expert witness reports	Jan. 22, 2013
Plaintiffs' Motion to Certify Class	Two (2) weeks after close of class certification expert discovery	Feb. 4, 2013 (Plaintiffs propose this deadline be tolled for discovery disputes.)
Defendants' Opposition(s) to Motion to Certify Class	Six (6) weeks after motion deadline	March 18, 2013
Plaintiffs' Reply in support of Motion to Certify Class (Noting Date)	Three (3) weeks after opposition	April 8, 2013

Defendants favor a stay of discovery until resolution of their pending motions to dismiss. Defendants also favor limiting discovery to class certification prior to Plaintiffs' motion for class certification.

Plaintiffs believe that discovery should commence immediately; oppose bifurcation; and favor making a reasonable attempt to limit discovery to class certification issues (recognizing

1 that these issues can overlap with merits issues) prior to the filing of Plaintiffs' motion for class  
2 certification. Plaintiffs' position is explained in more detail below.

3 **Plaintiffs Position:**

4 Plaintiffs believe that discovery will be needed on the following subjects: Collection and  
5 transmission of user and device data; use and analysis of such data; revenues arising from such  
6 use; discovery from networks and service providers that transmit such data; function and  
7 operation of the smartphones and AccuWeather software; reasons for integrating the software  
8 into the operating system; consumer-facing disclosures; security/privacy practices and  
9 vulnerabilities; the HtcLoggers feature; agreements and communications among the Defendants  
10 and with other developers, publishers, Google, and ad networks; and other relevant subjects.  
11 These are explained and identified with more particularity in Plaintiffs' Initial Disclosures,  
12 served on Defendants on February 2, 2012.

13 Plaintiffs propose that the parties meet and confer to discuss an ESI protocol within  
14 fourteen (14) days of the filing of this report.

15 Plaintiffs believe that fact discovery should commence immediately, especially given that  
16 AccuWeather.com, Inc. contends it is not the proper AccuWeather entity responsible for the  
17 acts/practices that Plaintiffs allege, yet AccuWeather objects to providing initial disclosures and  
18 any other discovery concerning the appropriate AccuWeather entity. Defendants' filing of  
19 motions to dismiss does not justify a stay of discovery. *See Del Vecchio v. Amazon.com*,  
20 No. C11-0366RSL, 2011 WL 1585623, at \*1 (W.D. Wash. April 27, 2011). The Federal Rules  
21 of Civil Procedure do not provide an automatic stay of discovery when a motion to dismiss is  
22 filed. *Id.* "[M]otions to dismiss are often unsuccessful and a stay could cause unnecessary and  
23 significant delays at the outset of the litigation." *Id.* Furthermore, Plaintiffs "could suffer  
24 prejudice by a potentially lengthy discovery stay, in part because they seek to enjoin on-going  
25 allegedly wrongful conduct." *Id.* "Actions seeking injunctive relief typically require more  
26 expeditious resolution than those seeking damages for past wrong." *Id.*

Moreover, there is no basis for bifurcating class and merits discovery in this case. Plaintiff believes that, in this case, substantive “merits” issues are closely related and intertwined with Rule 23 class certification issues such that bifurcation of discovery would be difficult and could lead to redundancies and inefficiencies. Determining what is and is not subject to class discovery would be difficult and subject to differing opinions, and thus likely lead to myriad discovery disputes and motions, creating a redundant and inefficient process. The Manual for Complex Litigation (4th ed. 2004) states that “[t]here is not always a bright line between the two. Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification.” Therefore, Plaintiff opposes bifurcation between “class” and “merits” discovery and a stay of “merits” discovery until after the Court rules on Plaintiffs’ class certification motion. *See* Fed. R. Civ. P. 23 advisory committee’s notes to subdivision 23(c)(1) (2003) (“discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification decision on an informed basis ... without forcing an artificial and ultimately wasteful division between ‘certification discovery’ and ‘merits discovery’”).

#### **Defendants’ Position:**

Defendants propose that discovery under Rules 30–36 be put on hold until the Court determines whether Plaintiffs have any viable claims that will proceed. If the Court were to deny Defendants’ respective motions to dismiss, Defendants propose that class certification fact discovery commence fourteen (14) days after an order on Defendants’ motion to dismiss, or an estimated date of April 20, 2012.

Defendants submit that the Ninth Circuit has repeatedly upheld the issuance of discovery stays pending resolution of potentially dispositive motions and has stated that “[i]t is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a



claim before forcing the parties to undergo the expense of discovery.” *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (“The purpose of [Rule] 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery.”); *see also Wenger v. Monroe*, 282 F.3d 1068, 1077 (9th Cir. 2002) (affirming stay of discovery pending resolution of defendant’s motion to dismiss) (citing *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (*per curiam*)); *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (affirming stay of discovery pending resolution of motions to dismiss where no “factual issues” were raised by the motions); *Little v. Seattle*, 863 F.2d 681, 685 (9th Cir. 1988).

Defendants further submit that, to increase efficiency, discovery on matters that do not bear on class certification be conducted only after the court issues a decision on class certification. Phased discovery of this sort (precertification discovery first, followed later by merits discovery) is contemplated by the federal Manual for Complex Litigation (*see, e.g.*, §§ 21.11, 21.14), which states that allowing full merits discovery before a decision on certification “can create unnecessary and extraordinary expense and burden” (*id.* § 21.14). Defendants’ submit that setting a schedule for merits discovery and dispositive motions may be premature, and request that the Court convene a further status conference within 14 days of an order ruling on Plaintiffs’ motion for class certification.

### C. Discovery Limits and Changes to Federal and Local Civil Rules

Plaintiffs submit that fact discovery should commence immediately and that discovery be conducted before a ruling on class certification should not be subject to a formal bifurcation between class and merits discovery.

Defendants jointly submit that all forms of discovery under Federal Rules of Civil Procedure 30–36 should not proceed until 14 days after the pleadings phase is complete. Specifically, Defendants propose that discovery commence no earlier than 14 days after (1) an order denying in whole or in part Defendants’ currently pending motions to dismiss, or (2) an

1 order denying in whole or in part Defendants' motion(s) to dismiss any subsequently filed  
2 amended complaint, whichever occurs later.

3 Defendant AccuWeather further submits that discovery, including initial disclosures,  
4 should not proceed until Plaintiffs substitute the appropriate entity as party defendant in place of  
5 AccuWeather.com, Inc. Defendant AccuWeather further believes that Plaintiffs currently have  
6 knowledge of the proper AccuWeather entity.

7 Plaintiffs contend that, given AccuWeather's contention that it is not the appropriate  
8 entity responsible for the acts/practices that Plaintiffs allege, there is all the more reason for early  
9 discovery.

10 Other than as set forth above, the parties do not request any changes or limits to the  
11 Federal or Local Civil Rules relating to discovery issues at this time, but reserve the right to  
12 make such a request at a later time if needed.

#### 13 **D. Managing Discovery To Minimize Expense**

14 The parties do not request any specific limitations on discovery beyond those listed above  
15 and elsewhere in the Federal Rules of Civil Procedure and this Court's Local Civil Rules.  
16 However, counsel for the parties have conferred and agreed to accept service via email pursuant  
17 to Federal Rule of Civil Procedure 5(b)(2)(E). The parties further expect that they will meet and  
18 confer in good faith to resolve any discovery disputes in this case to avoid unnecessary expense  
19 or delay and, if possible, without resort to motion practice.

#### 20 **E. Proposed Orders under Rule 26(c) or CR 16(b)–(c)**

21 The parties will meet and confer regarding the terms of an appropriate stipulation and  
22 proposed protective order and ESI protocol relating to the production of documents and the  
23 designation of confidential information contained in documents and testimony.

24 The parties do not request the entry of any additional order under Rule 26(c) or  
25 CR 16(b)–(c) at this time.

**6. Date by Which Discovery Can Be Completed**

As described above (*see* ¶ 5.B), the parties have submitted their differing views as to the schedule for pre- and post-certification discovery.

Plaintiffs estimate that fact and expert discovery can be completed no later than eight (8) months after a decision on class certification.

Defendants estimate that class-certification fact and expert discovery can be completed no later than January 22, 2013 (subject to the conditions discussed *supra*) with merits discovery proceeding thereafter if necessary.

**Proceeding before Magistrate Judge**

The parties do not consent to proceeding before a Magistrate Judge.

**7. Bifurcation of Liability and Damages Issues**

The parties submit that prior to a ruling on Defendants' motions to dismiss and Plaintiffs' motion for class certification, it is premature to determine whether and to what extent trial should be bifurcated between liability and damages or in some other respect.

**8. Pretrial Statements and Pretrial Order**

The parties jointly submit that the Pretrial Statements required by Local Rules CR 16(h)–(i), as well as the Conference of Attorneys pursuant to CR 16(k), the Final Pretrial Conference pursuant to CR 16(l), and the entry of a Pretrial Order in the form set forth in CR 16.1 (to be negotiated by the parties and submitted to the Court), will serve to make the trial more efficient and reduce the number and complexity of issues to be ruled on by the Court during trial.

**9. Other Suggestions for Shortening or Simplifying the Case**

The parties anticipate meeting and conferring (after a ruling on Defendants' respective motions to dismiss) to discuss the possibility of narrowing the issues in dispute for purposes of Plaintiffs' motion for class certification. Other than as discussed above, the parties have no additional suggestions for shortening or simplifying the case.

**10. Date that the Case Will Be Ready for Trial**

Plaintiffs estimate that this case will be ready for trial no later ten (10) months after a decision on class certification.

Defendants' submit that setting a trial date may be premature, and request that the Court convene a further status conference within 14 days of an order granting Plaintiffs' motion for class certification in whole or in part.

**11. Whether the Trial Will Be Jury or Non-Jury**

Plaintiffs' Class Action Complaint contains a jury demand. (Dkt. No. 1).

Defendants have not yet filed a responsive pleading, pending the Court's adjudication of their respective motions to dismiss. Defendants reserve the right to demand a jury for any counterclaims asserted in their respective responses to the complaint.

**12. Number of Trial Days Required**

The parties jointly estimate that they will need approximately ten (10) trial days to complete the presentation of evidence in this case.

**13. Names, Addresses, and Telephone Numbers of all Trial Counsel**Trial counsel for Plaintiffs:

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**14. Service of Complaint on all Defendants**

Defendant HTC America, Inc. was served with the Complaint on November 30, 2011.  
Defendant AccuWeather.com, Inc. was served with the Complaint on December 12, 2011.

**15. Scheduling Conference**

The Defendants jointly request that the Court convene a scheduling conference before entering the scheduling order in this case. Plaintiffs believe a conference is unnecessary.

DATED: February 9, 2012

s/ Christopher B. Durbin

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1 DATED: February 9, 2012

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23 Attorneys for Defendant ACCUWEATHER.COM, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that on February 9, 2012, I electronically filed the foregoing **Joint Status Report and Discovery Plan Pursuant to Fed. R. Civ. P. 26(f) and Local Rule CR 16**, with the Clerk of the Court using the CM/ECF system, which will send an email notification of such filing to the attorneys of record listed below.

- Cliff Cantor (cliff.cantor@comcast.net)
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s/ Christopher B. Durbin  
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